Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 453.

EASTERN BUILDING AND LOAN ASSOCIATION, OF SYRACUSE, NEW YORK, PLAINTIFF IN ERROR,

AGAINST

DAVID W. EBAUGH, DEFENDANT IN ERROR.

Now comes the defendant in error, by its counsel appearing in that behalf and moves the Court to dismiss the Writ of Error in the above entitled cause for want of jurisdiction, because the Judgment brought up on said Writ of Error is the judgment of the Supreme Court of the State of South Carolina, sitting at Columbia, S. C., and it appears that no Federal question was involved in said judgment and the decision of said cause.

And the said defendant in error, by Counsel as aforesaid, also moves the Court to affirm the judgment brought up by the said Writ of Error, because, although the record of said cause may show that this court has jurisdiction in the premises, it is manifest that said question involved was frivolous, and that said Writ of Error was sued out for delay only.

W. H. LYLES,
H. J. HAYNSWORTH AND
L. O. PATTERSON,
Counsel for the Defendant in Error for the purposes of these motions only.

SUPREME COURT OF THE UNITED STATES,
October Term, 1900.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.
Plaintiff in Error,
AGAINST
DAVID W. EBAUGH, Defendant in Error.

To Wm. Hepbern Russell and Wm. Beverly Winslow, attorneys for the Plaintiff in Error:

Please take notice that on Monday the 21st day of January, 1901, at the opening of Court, or as soon thereafter as Counsel can be heard, the motions, of which the foregoing are copies, will be submitted to the Supreme Court of the United States for the decision of said Court thereon. Annexed hereto is a copy of the brief of Argument to be submitted with said motions in support thereof.

W. H. LYLES,
H. J. HAYNSWORTH AND
L. O. PATTERSON,
Counsel for Defendant in Error for the purposes of these motions only.

ABSTRACT OF CASE.

This case was brought up, by Writ of Error, to the Supreme Court of South Carolina. The Writ is based on the ground that full faith and credit was not given to the laws of New York.

The history of the case briefly stated is as follows:

The plaintiff in error was chartered in 1890; in 1892 one of its agents approached Ebaugh and exhibited to him circulars issued by plaintiff in error, which stated that persons subscribing to the stock of said company would, after 78 payments of 75 cents each, receive par ($100) from the Company for each share of their stock. He also exhibited a certificate of stock containing this provision among others:—"The said Eastern Building & Loan Association of Syracuse, N. Y., agrees to pay said share-holder, or his heirs, executors, administrators or assigns the sum of $100 for each of said shares at the end of 78 months from the date hereof." Ebaugh relied upon this rep-

resentation and took 10 shares of stock of the par value of $100 each. The certificate of stock issued to him contained the promise as quoted above. (Pages 10-11.) In pursuance of the contract contained in this certificate Ebaugh made 78 monthly payments upon said stock, and then surrendered the stock and demanded payment in full in pursuance of said promise. The Association declined to pay the claim, alleging that it was not bound by the promise. Ebaugh then brought his action on this promise in the Court of Common Pleas for Greenville County, S. C. (Pages 1–2.) The Association answered alleging among other things that the contract was ULTRA VIRES under the laws of New York. (Pages 4–9.) By consent, all issues of law and fact were referred to Oscar Hodges, a member of the Greenville bar. At the reference before him Ebaugh proved the facts alleged in the complaint. (Pages 13–14.) The plaintiff in error then undertook to prove that this contract was void under the laws of New York. In order to do this (page 15) he introduced the following evidence:

"An Act known as Chap. 122, passed April 10, 1851, (page 31); an Act amendatory thereof, passed June 9, 1875, (page 35.) Neither contains any terms forbidding such contracts as the one in controversy.

(2) The decision in O'Malley vs. People's Building, Loan & Savings Association, rendered in 1895 by the Supreme Court of New York, was likewise introduced in evidence, (pages 15 and 38.)

(3) Also certain decisions in the Court of Appeals of New York; these, however, bear only remotely upon the question at issue and are far from being conclusive upon the point, (page 15.)

(4) Also deposition of D. A. Pierce, which stated that the Association was not bound by this promise. He based his opinion upon the statutes referred to above, and the decision in O'Malley's case, and decisions from other States, (page 41.)

In reply to this evidence Ebaugh introduced certain decisions of the Court of Appeals of New York, (page 16,) to-wit:

Whitney Company vs. Barlow 63, N. Y., 63.
DeGrabb vs. American Linen Thread Company, 21 N. Y., 124.
Diamond Match Company vs. Pooler, 106 N. Y., 473.

These cases decide that where a corporation made a contract in excess of its corporate powers, but received and retained the benefit therefrom, it would be estopped to deny its liability. There was no evidence to disprove this doctrine. (Referee's Report, page 25.)

On this testimony the Referee held that the contract in question was not forbidden by the statutes of New York, and that it was not immoral, (pages 25-26) and announced that he saw no reason why under the statutes of New York a corporation of this class could not issue stock to be fully paid up after 78 months and redeemable at par at the end of that time. He held that even, if the contract were in excess of the powers of the corporation, it was estopped under the laws of New York, by reason of the fact that it had induced Ebaugh to enter into the contract by its representations that the contract was valid, and it had recived and retained the benefit of the transaction. He held further that O'Malley's case was not controlling, being influenced by two reasons:—

(1) The decision was rendered in 1895, whereas the contract sued on was made in 1892.

(2) The decision was made by the Supreme Court of the State of New York, which is not a court of last resort.

To this report the Association excepted on certain grounds which are set forth in the record.

The matter was then heard by the Circuit Judge, who affirmed the Referee's report, and gave judgment for the full amount of the claim, stating that he was satisfied that the report of the referee was correct in every particular, (page 64.)

The case then went to the Supreme Court of the State, and that Court, after full hearing, affirmed the judgment below, holding that the laws of New York were not in conflict with the construction placed upon the contract by the Courts of South Carolina.

GROUNDS OF MOTION.

(1) The Courts of South Carolina did not deny validity to the statutes of New York.

(2) These Courts did not refuse to be governed by the de-

cisions of the Court of Appeals of New York, construing the statutes of that State, rendered prior to the contract.

(3) These Courts did not decline to be governed by the common law of New York.

These grounds will be developed in the argument which follows.

ARGUMENT AND AUTHORITIES.

(1) Is the Judgment in this Case a Denial of the Validity of the Statutes of New York?

The statutes introduced in evidence by the defendant do not, in express terms, forbid building and loan associations from making such contracts as that made with Ebaugh. The conclusion that such contracts are forbidden by these statutes can be reached only by construction. Mere error in the construction of a statute of another state furnishes no basis for a federal question.

In Glenn vs. Garth, 147 U. S., 360, the chief justice employed the following language:

"If every time the courts of a state put a construction upon the statues of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, in would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated. The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court."

Accordingly the writ of error was dismissed, the court declining to consider whether there was error in the construction given the statute by the state courts.

The foregoing doctrine was reaffirmed in Lloyd vs. Matthews, 155 U. S., 222.

In Bonholzer vs. New York Life Insurance Company 178, U. S., 402, a similar question arose; the defendant in error moved to dismiss because the Supreme Court of Minnesota did not deny the validity of the New York statute, but only con-

strued it, and even granting the construction was erroneous, faith and credit were not denied to the statute. The Supreme Court referring to Glenn vs. Garth, 147 U. S., 360, and Lloyd vs. Matthews 155, U. S., 222, employed the following language:

"The question now before this court is, did the court below, in the case at bar, give to the statute such full faith and credit as is secured to it by the Constitution of the United States?

"That question, therefore, is made the ground of our jurisdiction. The defendant in error challenges its sufficiency, and moves to dismiss because the Supreme Court of Minnesota did not deny the validity of the New York statute, but only construed it, and even granting the construction was erroneous, faith and credit was not denied to the statute.

Glenn vs. Garth, 147, U. S., 360.
Lloyd vs. Matthews, 155 U. S., 222.

"Those cases sustain the distinction, which defendant in error makes, and the deduction from it, and our inquiry will therefore be: Did the Supreme Court of the State of Minnesota deny the validity of the New York statute, or only consider its operation and effect? The claim of the defendant in error is that each of the notes was an "installment or portion of the premium," and that therefore the Supreme Court of Minnesota, in holding that the notice prescribed by section 92, was not necessary to be given prior to the maturity of the notes, denied full faith and credit to the statute.

"We dispute the conclusion without passing on the premises. The ruling was a construction of the statute, not a denial of its validity, and that the Court meant no more, and meant to follow, not oppose, the decisions of the State, is evident from its opinion."

Reference to the proceedings in the State Courts in the case at bar will conclusively show that the validity of the New York statutes was not denied, and that the error, if any, was in the construction.

The Referee said: "The defendant introduced in evidence chapters 122 and 564 of the Statutes of New York, under which defendant's charter was issued. And he urges upon me to hold that these Acts forbid the defendant to make a contract

such as that contained in the certificate. There is no provision in these statutes which forbids such a contract; the most that can be said is that the statutes do not confer the powers or authorize a corporation chartered under them to make such an agreement; in other words, that such an agreement is in excess of its charter powers. But I am by no means convinced that these Acts do not confer upon building and loan associations the power to make an agreement of the kind set forth in the certificate of stock. The objection urged against this agreement is that it provides for the maturity of the stock at a definite time. Chapter 122, par. 2, authorizes building and loan associations to provide "the manner of redemption of shares by advances made thereon," "and the ultimate amount to be paid to the owners of unredeemed shares." This chapter as well as chapter 564 evidently contemplates that a building and loan association may issue paid up stock, and they do not impose any limitation upon the price at which such stock is to be issued, or as to terms of its redemption. It is clear that under these statutes the Association could issue ten shares of paid up stock for five hundred and eighty-five dollars in cash, to be redeemed at the end of seventy-eight months. For the same reason I do not see why such an Association may not issue stock to be fully paid up by seventy-eight monthly payments and to be redeemed at par at the end of that time. The latter promise may be unwise, but this is not the question at issue. It is whether such a contract is forbidden by the Statutes. I am clearly of the opinion that it is not forbidden by the statutes, and I so hold. The most that can be said is that such a promise is not authorized by the statute.

"I, therefore, conclude that the promise made by the defendant to pay the plaintiff one hundred dollars for each share of stock at the end of seventy-eight months, is not immoral in itself, and is not forbidden by statute either in New York or in this State."

These holdings of the Referee were confirmed first by the Circuit Judge and then by the Supreme Court.

(2) DID THE COURT IN REACHING THIS CONCLUSION REFUSE TO BE BOUND BY THE DECISION OF THE COURT OF LAST RESORT OF NEW YORK?

The only decisions introduced by the defendant were, (1) O'Malley vs. People's Building, Loan & Savings Association, 92 Hun., 572; (2) Englehart vs. Fifth Ward Dime & Savings Association, 148 N. Y.; (3) People vs. Lowe 117 N. Y., 175, and (4) Concordia Savings & Aid Association vs. Reed, 93 N. Y., 474.

The last three cases did not touch the question whether a corporation formed under chapters 122 and 564 possessed power to make a contract like the one in question. Their influence in the case at bar was persuasive only: their application solely as an argument (rather remote) touching the proper construction.

O'Malley's case was in point, but was not controlling, for two reasons, as follows:

(1) It was a decision of the Supreme Court of New York, which is not a Court of Last Resort.

On this point the Referee said, (p. 27) "The decisions of the Supreme Court of New York, do not settle the law of that State. They tend to this result no more than do Circuit decisions in South Carolina."

The decisions of inferior courts do not constitute controlling precedents or rules to be followed in other cases. STARE DECISIS applies only to decisions rendered by courts of last resort.

In order to show a controlling rule of construction, it was necessary for the plaintiff in error to prove a decision of a court of last resort sustaining the construction for which it contended. But it failed to do this.

The suggestion, that Ebaugh did not prove that the Supreme Court of New York is not a court of last resort, loses sight of the fact that the BURDEN OF PROOF WAS UPON THE PLAINTIFF IN ERROR.

(2) The decision in O'Malley's case was rendered in 1895 (p. 15), whereas the contract with Ebaugh was made in 1892.

In Burgiss vs. Seligman, 107 U. S., 20, it is said, "So where contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions or when there has been no decision of the state tribunals, the federal courts properly claim the right to adopt their own inter-

pretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have occurred."

This doctrine has been re-affirmed by numerous cases including Folsom vs. Ninety-six, 159 U. S., 611.

At the time when the contract with Ebaugh was made, there was no decision of the New York courts maintaining the construction for which the association contends. Had the question involved here arisen at that time, there was nothing to prevent the South Carolina Courts from exercising their independent judgment as to the proper construction of the acts of incorporation. The courts of that State in judging between the plaintiff and defendant in error, were governed by their view as to the proper interpretation of these statutes. In refusing to be controlled by a decision of an inferior court rendered subsequent to the contract, they have not violated the constitutional provision as to full faith and credit.

But, say our friends on the other side, the testimony of Mr. D. A. Pierce is ignored.

Mr. Pierce was the general attorney for the plaintiff in error from the time of its organization (p. 4), and, as it is natural to presume, approved the form of the contract made in the present case.

He states that under the statutes, articles of incorporation, by-laws and decisions, the association was not bound by the promise to pay par for the stock after 78 monthly payments. (Why he permitted the Association to issue these contracts, knowing their invalidity and that the unwary and unsuspicious would be misled to their undoing, he does not explain.) He stated further, "I base my opinion on the statute under which the defendant is incorporated, its articles of incorporation and by-laws, and the decision of the Supreme Court of the State of New York in the case of O'Malley vs. People's Building & Loan Association, 92 Hun., 572, and similar decisions of other States on like statutes."

This testimony discloses absolutely no new light. The opinion of Mr. Pierce as to the proper deduction to be drawn from the statutes and decisions may or may not be instructive. It is hardly controlling upon the South Carolina Courts.

(3) DID THE SOUTH CAROLINA COURTS REFUSE TO RECOGNIZE THE COMMON LAW OF NEW YORK?

We have already adverted to the evidence as to the laws of New York introduced by the plaintiff in error, and to the principles sought to be deduced.

On the other hand the defendant in error introduced in evidence certain decisions of the Court of Appeals of that State for the purpose of showing that, even assuming the contract with Ebaugh to be in excess of its charter powers, the association would nevertheless be bound to the performance of this contract, if it received and retained the benefits thereof. These decisions are as follows:

DeGrab vs. American Linen Thread Co., 21 N. Y., 124.
Whitney Co., vs. Barlow, 63 N. Y., 63.
Diamond Match Co. vs. Pooler, 106 N. Y., 473.

The referee, stating that the above cases were the only evidence before him as to the New York law on this point, continued:

"I find as a matter of fact, that the law of New York is that where a corporation enters into a contract that is in excess of its charter powers or is unauthorized by law, it will nevertheless be bound to perform its agreement as contained in the contract, if it suffers the other party to perform his agreement, and receives the benefits and retains them.

"This being the law of New York, it isconclusive of the case at issue.

"I find as a matter of fact that the defendant promised to pay to the plaintiff one hundred dollars for each share of the stock taken by him, at the end of seventy-eight months; and that it represented to him that in issuing this stock it would be bound to perform this agreement according to its terms.

"I further find that the plaintiff was induced by this promise and this representation to take the stock; and that believing the promise to be valid and that the defendant intended to perform it, he paid the entrance fee and the monthly dues.

"I further find that the defendant, knowing that the plaintiff relied upon the validity of this promise, allowed him to pay his money; and that defendant has continued to hold on to this money and has never offered to return it.

"I, therefore, hold that, even if the contract made by the defendant was in excess of its charter powers, it would not be heard to plead ULTRA VIRES, but would be bound under the law of New York to perform its promise as expressed in the certificate." (Brief, p. 26.)

These holdings were approved by the Circuit and Supreme Courts.

This doctrine accords with the common law of South Carolina. See Williamson vs. Eastern B. & L. Association, 54 S. C., 382, where it is said: "The general rule is that where a private corporation has entered into a contract not immoral in itself, and not forbidden by any statute and it has been in good faith performed by the other party, the corporation will not be heard on a plea of ULTRA VIRES."

Many States besides New York and South Carolina uphold this doctrine.

Rd. Co. vs. McDonald, 60 Am. St. R. 172.

The extracts from the Referee's report serve to show that it, was the intention of the South Carolina Courts to decide this case according to the laws of New York. If there was any error in the decision, it was in the apprehension of that law. Error in the construction to be placed upon statutes and decisions of another State do not amount to a refusal of full faith and credit.

Barholzer vs. N. Y. Life Ins. Co., SUPRA.

We submit, further, that where a contract, whose force and construction are referable to the laws of one State, comes in question in the Courts of another State, these Courts are not bound to give ear to any defence regarded by them as wrong or immoral, merely because such defence would have availed the defendant under the laws of the place of contract. To overrule such defence would not amount to a denial of faith

and credit of the laws of another State, but would merely enforce estoppel arising under general principles of law. Hence no federal question would be raised.

Gilles vs. Stinchfield, 159 U. S., 653.

We, therefore, submit that the motion should be granted.

W. H. LYLES,
H. J. HAYNSWORTH &
L. O. PATTERSON,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1903.

Term No. 462.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,

Plaintiff in Error,

vs.

DAVID W. EBAUGH,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

ARGUMENT IN OPPOSITION TO MOTION TO BE HEARD AT THE SAME TIME AND TOGETHER WITH CASE No. 190.

HENRY A. M. SMITH,

Counsel for Walling & Kennedy,

Defendants in Error in Case No. 190.

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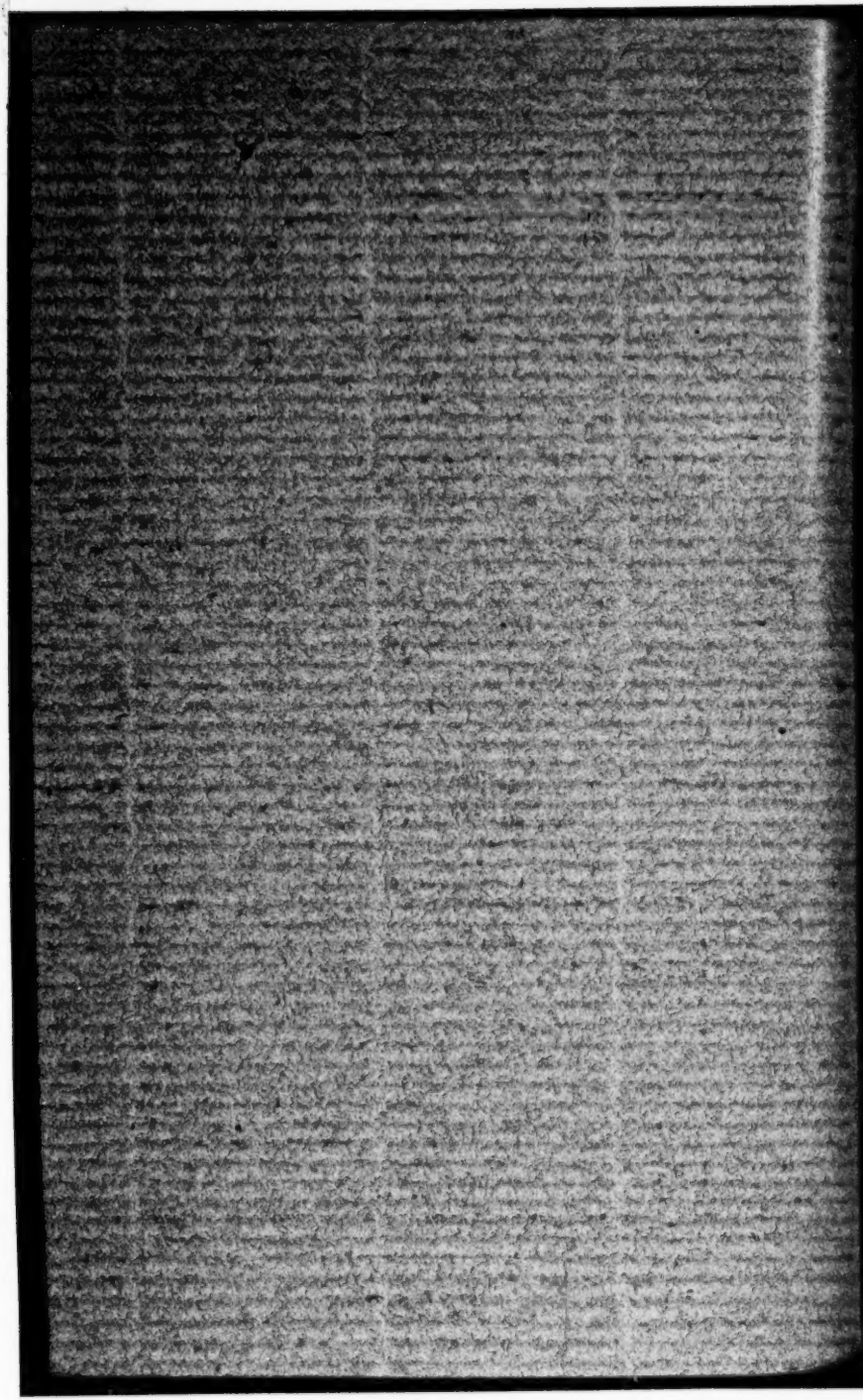

Supreme Court of the United States.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK, Plaintiff in Error, vs. DAVID W. EBAUGH, Defendant in Error.	October Term, 1900. No. 453. Motion to Advance and Hear Together.

BRIEF OF ARGUMENT OF HENRY A. M. SMITH ON BEHALF OF LAWRENCE S. WELLING AND MARION BONNOITT IN OPPOSITION TO MOTION.

This is a motion to advance the Case, No. 453, of "The Eastern Building and Loan Association of Syracuse, N. Y., Plaintiff in Error, vs. David W. Ebaugh, Defendant in Error," so as to be heard at the same time and together with the Case No. 190, of "The Eastern Building and Loan Association of Syracuse, N. Y., Plaintiff in Error, vs. Lawrence S. Welling and Marion Bonnoitt, Defendants in Error," who now file this brief of argument in opposition to the said motion, which they decline to assent to and oppose.

Under the provisions of the 8th subdivision of Rule 26, of this Court, it is provided that two or more cases involving the same question, may, by the leave of the Court, be heard together, but they must be argued as one case. The effect of the motion now before the

Court, therefore, will be that these two cases will be consolidated, and heard together as a single case, if the motion is granted. This Court, however, has decided under the terms of the rule, that one case will not be advanced and heard with another, without the consent of the counsel in both cases.

See *Louisiana v. New Orleans*, 103 U. S., p. 521.
Mays' U. S. Supreme Court Practice, 388.

In addition thereto, we oppose on the ground that the cases are in many material respects wholly dissimilar, and that it would be prejudicial to the separate interests involved in either, that they be heard together.

First. The defendants in error in each case are represented by separate and wholly independent counsel. Although both were cases brought from the Supreme Court of the State of South Carolina, by writ of error, they were cases heard by that Court at different times, upon different issues, and different decisions were filed therein. (Ebaugh Transcript, p. 67, fols. 100-101; Welling & Bonnoitt Transcript, pp. 97-101, fols. 183-188.)

Second. The cases are furthermore wholly dissimilar in the following respects :

It is incorrect, as stated by the counsel on behalf of the motion, that the defendants in error in each case are members of and stockholders in said plaintiff in error. On the contrary, in the case against Welling and Bonnoitt, the question is one entirely of a debtor and creditor relation between the plaintiff in error and the defendants in error (Welling & Bonnoitt Transcript, p. 49, fol. 90.)

It is true, the plaintiff in error *claims* that Welling and Bonnoitt were members of and stockholders in the plaintiff in error, but this claim is strenuously *denied* by Welling and Bonnoitt, who claim themselves to be

wholly independent debtors of the plaintiff in error, and not members in or stockholders thereof. (Ibid.)

Second, although the questions involved in each case are in some respects similar, in others they are most materially different and dissimilar. In the Ebaugh case, it is admitted that he is a member of and shareholder in the Eastern Building and Loan Association. As such member, he is suing the Association of which he is a member, to recover from that Association what he claims to be the maturity value of his certificates of membership. (Ebaugh Transcript, pp. 2-3, fols. 2-4.)

On the other hand, Welling and Bonnoitt deny that they are members of that Association. They insist that they were simply debtors of that Association, to which Association they had given a number of notes, secured by a mortgage. All these notes they paid, and they claim that having paid these notes, they had paid out the debt, and the mortgage was satisfied. (Welling & Bonnoitt Transcript, pp. 2-3, fols. 4-6.)

It will be seen, therefore, that at the very inception of the case there is a very fundamental difference between them. In the one, the Ebaugh case, it is a question of the rights of a shareholder against the corporation of which he is a member, and the laws, rules and by-laws of which he may have adopted by such membership. While in the other case it is a question between a foreign corporation carrying on business in the State of South Carolina, and certain citizens in the State of South Carolina, who acquired and for a time occupied the relation of debtors to that corporation.

Counsel for the motion erroneously state that in each case the defendants in error base their right of action upon the proposition that the statement of the time of the maturity of the stock was a valid agreement on the part of the plaintiff in error to pay the maturity value of the stock at the end of eight months thereafter.

This is true as to the Ebaugh case. It is not true as to the Welling and Bonnoitt case. In the Welling and Bonnoitt case, the defendants in error base their right

of action upon the proposition that they had ceased to be members of the plaintiff in error, and the entire relationship existing between the plaintiff in error and themselves had by agreement been converted into negotiable notes, representing that relation, and having paid those notes, they had fully terminated all relation between themselves and the Association. (Welling & Bonnoitt Transcript, pp. 2, 3, 49; fols. 4-6, 190.)

That is the question, and is the question upon which Welling and Bonnoitt base their right of action—whereas it does not appear as a question in anywise in the Ebaugh case. In addition, Welling and Bonnoitt may make the question that even if they were shareholders in this agreement to mature in seven or eight months would operate as an additional ground for justifying their action against the plaintiff in error; but this proposition on their part is simply an incidental and subsidiary one to the main question, which is that they were not shareholders in that Association, but were only debtors thereto, and had discharged their debt.

Third. The counsel for the motion, in parallel columns, places the assignments of error which have been made by such counsel for the purpose of the writ of error in each case to this Court. It is not, however, the assignments of error which determine the issues before this Court. Counsel may have assigned as error, errors in one case which do not appear as error in the other case. Although the assignments in each appear the same, an examination of the record in each case shows that the questions before the State Courts were wholly dissimilar. The issues as they appear before the State Courts must be deduced from :

1st. The pleadings in the case.

2nd. Exceptions to the rulings of the lower Court for the purpose of the appeal to the Supreme Court.

By reference to the pleadings in the Welling and Bonnoitt case, it will be seen that none of the questions raised by the assignments of error are therein contained.

(Welling & Bonnoitt Transcript, pp. 2-6, pp. 93-94; fols. 174-178.)

The complaint alleges only that Welling and Bonnoitt, who had been mortgage debtors, by the terms of certain specific promissory notes secured by a mortgage to the Eastern Building and Loan Association, had fully paid that mortgage, and then had required satisfaction thereof, which the Building and Loan Association had refused to enter, and therefore they sued for damages. (Ibid.)

The Eastern Building and Loan Association in their answer set up that Welling and Bonnoitt were not simply creditors, but were also stockholders in the Association, and by and under the terms of the charter of the Association they did not, by the terms of the notes, fully pay and discharge the mortgage. (Welling & Bonnoitt Transcrip, pp. 4-6, fols. 7-11.)

In the exceptions to the rulings of the Court below, and which exceptions constitute the statement of all questions upon which the case is heard in the State Supreme Court, certain questions are raised, but there is not a single reference to or statement of any such Federal questions as are stated in the assignments of error, and it is therefore manifest that none of the questions interjected in the assignments of error were raised or passed upon by the Court below. They were raised or passed upon in the Ebaugh case; but the very fact that they were raised in one case, and not in the other case, ought to show the essential difference between the two cases, and intensify the reasoning why they should not be heard together.

Fourth. The two cases, therefore, being as the defendants in the case of Welling and Bonnoitt strenuously insist, wholly dissimilar, and involving different issues, this Court under its ruling will not, against their protest, order the same heard together as one case, and thus compel counsel for the defendants in error in the

Welling and Bonnoitt case to argue questions in which he is not concerned, and yield up any of his time for the argument of questions he considers essential to his client, to the counsel in the Ebaugh case for the argument of questions peculiar to that case.

Respectfully submitted.

HENRY A. M. SMITH,
Attorney for Welling and Bonnoitt.

Supreme Court of the United States

OCTOBER TERM, 1901.

No. 177.

EASTERN BUILDING AND LOAN ASSOCIATION, OF SYRACUSE, NEW YORK, Plaintiff in Error,

vs.

DAVID W. EBAUGH, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF ARGUMENT ON BEHALF OF DEFENDANT IN ERROR.

STATEMENT OF FACTS.

The plaintiff in error was chartered under the laws of New York, and had its principal place of business in Syracuse, but was authorized to do business in other States. For the purpose of inducing persons from other States to become members and borrowers in said Association, it sent out agents and issued circulars.

Some time in March, 1892, an agent of the plaintiff in error came to Greenville, S. C., and approached David W. Ebaugh for the purpose of inducing him to take stock in the Association. This agent told Ebaugh that the stock would mature in 78 months, and the Company would pay $100 per share. He also exhibited to Ebaugh certain circulars which were issued by the Company (page 14).

The circulars, after announcing that no building and loan

association had ever failed, and that no investments had proven so satisfactory, contained what is called a short catechism, wherein these questions and answers were given: Q. When will the shares reach their par value? A. Shares mature in exactly 6 1-2 years. Q. How much will a member have to pay in altogether? A. On a basis of ten shares ($1,000 maturity value) he will pay in $595, and receive $1,000." (Page 18.)

Elsewhere in this same circular it is stated "All shares, on which payments are made, are regularly matured at the expiration of 78 months (6 1-2 years from date of certificate)." (Page 19.)

In another part of said circular (page 23) it has given a table, which purports to give the "maturity value of shares at end of 6 1-2 years." This table states such maturity value of 10 shares to be $1,000.

On the cover of this circular is to be found the following statement: "The only association making a contract definite in every particular;" also "Stock matures in 78 months."

Ebaugh believed these representations made by the agent and the circulars, and was thereby induced to apply for 10 shares of stock in the association (page 14.)

Thereupon the association issued Ebaugh a certificate for 10 shares of stock, dated April 1st, 1892. This certificate had at its head the following words: "Maturing October 1st, 1898." It contained the following terms: "The said Eastern Building and Loan Association of Syracuse, N. Y., agree to pay said shareholder, or his heirs, executors, administrators or assigns the sum of $100 [illegible] shares at the end of 78 months from the date hereof."

This promise was prominently set forth in the circular and the certificate of stock. It was plain, unmistakable and emphatic, and unconditionally bound the association to pay par after seventy-eight monthly payments.

The stipulation on the back of the certificate of stock to the effect that the stockholder should pay 75 cents per month until "such share matures or is withdrawn," must be construed in connection with the unconditional promise on the face of the policy fixing the period of maturity after seventy-eight monthly payments of seventy-five cents each. Upon the representations contained in the circulars and on the promise made in the certificate, Ebaugh became a subscriber. He paid the membership fee of ten dollars, and regularly each

month paid his monthly dues. On October 1st, 1898, he made the final payment and surrendered his certificate to the association, and asked for the payment of $1,000. The association retained this certificate, but declined to pay and informed Ebaugh that this promise to pay $1,000 after seventy-eight monthly payments was in excess of its charter powers, and that he would have to take his chances with those members who withdrew their stock before maturity. Some correspondence then followed between Ebaugh and the association, and failing to obtain payment, or any satisfactory adjustment Ebaugh brought this action in the Court of Common Pleas for Greenville County, South Carolina, and attached certain property of the association which was in that State.

By consent all issues of law and fact were referred to Oscar Hodges, Esq., a member of the Bar of South Carolina.

At the hearing Ebaugh introduced proof of the facts contained in the forgoing statement. The plaintiff in error then undertook to prove that the contract was void under the laws of New York, and for this purpose it introduced the following evidence:

(1) An Act known as Chap. 122, passed April 10, 1851, (page 31); An Act amendatory thereof, passed June 9, 1875, (page 75); neither contains any terms forbidding such contracts as the one in controversy.

(2) Articles of Association and By-Laws. These show that it was intended to transact business in other States besides New York, and, hence, that the business of the association should be conducted under other laws besides the laws of that State. They also show that the association was not confined in its business to the limits of a strictly building and loan association, and that the directors had the power to contract as to the maturity of the shares.

(3) The decision in O'Malley vs. People's Building, Loan and Savings Association, rendered in 1895 by the Supreme Court of New York, was likewise introduced in evidence, (pages 15 and 38).

(4) Also certain decisions of the Court of Appeals of New York. These, however, bear only remotely upon the ques-

tion at issue, and are far from being conclusive of the point, (page 15).

(5) Also deposition of D. A. Pierce, which stated that the association was not bound by this promise. He based his opinion upon the statutes referred to above, and the decision in O'Malley's case, and decisions from other States, (page 41).

In reply to this evidence Ebaugh introduced certain decisions of the Court of Appeals of New York, (page 16) to wit:

Whitney Company vs. Barlow, 63 N. Y., 62.

DeGrabb vs. American Linen Thread Company, 21 N. Y., 124.

Diamond Match Company vs. Roeber, 106 N. Y., 473.

These cases decide that where a corporation makes a contract in excess of its corporate powers, but receives and retains the benefit thereof, it is estopped to deny its liability. There was no evidence to disprove this doctrine. (Referee's Report, page 25.)

After full argument the referee filed his written report to be found at pages 25 to 28. He held that the contract in question was not forbidden by the Statutes of New York, that it was not immoral, and announced that he saw no reason why, under the Statutes of New York, a corporation of this class could not issue stock to be fully paid up after 78 months and redeemable at par at the end of that time. He held further that even if the contract were in excess of the charter powers of the corporation, it was estopped under the laws of New York from pleading ultra vires by reason of the fact that it had induced Ebaugh to enter into the contract by its representations and promises, and had received and retained the benefits of the transaction. He held further that O'Malley's case (relied on by the plaintiff in error) was not controlling for two reasons. (1) The decision was rendered in 1895, whereas the contract sued on was made in 1892; (2) the decision was rendered by the Supreme Court of the State of New York, which is not a Court of last resort. The referee, therefore, held that the plaintiff was entitled to recover judgment according to the terms of the contract.

To this report the association excepted on certain grounds

which are set out in the record. The matter was then heard by the Circuit Judge who affirmed the referee's report, stating that he was satisfied that the report of the referee was correct in every particular (page 64).

The case then was taken to the Supreme Court of South Carolina, and that Court, after a full and fair hearing, affirmed the judgment below.

The case now comes to this Court upon certain assignments of error, which make the following points: (1) That the State Court erred "in refusing to give full faith and credit to the public acts, records and judicial decisions of the State of New York." (2) That it erred in its construction of the contract. (3) That it erred in construing the Statutes of New York. (4) That it erred in construing the decisions of New York. (5) That the decision below impaired the obligation of the contract in question.

We shall see in the further discussion that no federal question is involved in the 2nd, 3rd and 4th points.

At the last term of this Court the defendant in error submitted a motion to dismiss on the ground that it appeared on the face of the record that no federal question was involved, in that the State Court (1) neither denied validity to the Statutes of New York, (2) nor refused effect to the decisions of the Court of last resort, (3) nor to the common law of that State.

This motion was, by an order of the Court, continued until the hearing upon the merits.

We now press this motion and ask the attention of the Court to our printed argument heretofore submitted.

The defendant in error claims that the State Court ought to have decided this question according to the laws of New York; that the decision was opposed to those laws; and that thereby at least two clauses of the Federal Constitution were violated. We will discuss these questions in the order stated.

I.

THE SOUTH CAROLINA COURTS WERE NOT BOUND TO DECIDE THIS CASE ACCORDING TO THE LAWS OF NEW YORK.

The sale of shares to Ebaugh was clearly within the corporate powers of the corporation. The only question made

is whether the agreement as to fixed maturity, contained in the certificate, can be enforced.

Counsel insists that under the laws of New York this agreement cannot be enforced because it operates as a discrimination between shareholders, and that such agreements are unauthorized by the laws of that State.

The law of South Carolina, however, is that such agreements can be made; but even where unauthorized, the association will be held to perform its promise after issuing the certificate and receiving the benefits, and that otherwise a fraud would be permitted. The question now is whether the South Carolina Court in a case where it has complete jurisdiction of the subject matter and of the persons, is bound to yield its own judgment to what is alleged to be the law in New York.

We submit that it is not, and for the following reasons:

(A)

The question as to the authority of mutual associations to make contracts of this kind is one of general law. It must be solved by reference to the general relation between the association and its members, and not, as we shall presently show, by any special provision of the New York Statutes. So clearly is the contract of membership a matter of general law, that counsel for plaintiff in error seeks to apply to it the provisions of the Interstate Commerce Act. (Brief, page 59.)

Clearly the Courts of the forum are not bound to follow the decisions of the Courts of the place of contract, touching matters of general law.

(B)

The contract of the defendant in error expressly provided that it could do business in any State (record, p. 48).

When, therefore, persons became members of this association, this provision, being in the charter, became a part of the contract. The contract of membership, then, had reference to the corporation carrying on business in other States, which business must necessarily be conducted under the laws of those States, and which might result in imposing upon them a different liability, and giving to them different rights from those obtaining under the laws of the place of in-

corporation. This doctrine is illustrated by the recent case of Pinney vs. Nelson, decided by this Court on December 2, 1901.

The facts in that case are as follows: The Los Angeles Iron and Steel Company was organized under the laws of Colorado, which provided that stockholders should not be liable for the debts of the corporation, beyond their stock. The articles of association declared that the company could do business in the State of California. The laws of that State provide that stockholders of foreign corporations, doing business in the State, should be subject to the same liability as stockholders in domestic corporations, and that these latter were liable for all debts of the corporation in proportion to their stock. The company failed, and suit was brought against certain stockholders in the Courts of California, which rendered judgment for the liability imposed by the laws of that State.

On writ of error to this Court the judgment of the State Court was affirmed. Mr. Justice Brewer, delivering the opinion of the Court, employed the following language:

"Not content to rely upon the general authority which by the rules of comity the Colorado corporation would have to enter California and transact business therein, they in terms set forth that a part of the purpose of the incorporation was the transaction of business by the corporation in California. Now, when they in terms specified that they were framing a corporation for the purpose of having that corporation do business in California, is it not clear that they were contracting with reference to the laws of that State? Contracting with reference to the laws of that State they must be assumed to know the provisions of those laws; that by them a personal liability was cast upon the stockholders in corporations formed under the laws of the State, and that that same liability was also imposed upon the stockholders of corporations formed under the laws of other States and doing business within California. How can it be said that those laws do not enter into the contract and control as to all business done in pursuance of that contract within the limits of California? Suppose these same stockholders in Colorado had formed a partnership with the expressed intent of carrying on business in California, would not that expressed intent be a clear reference to the laws of California and an incorporation of those laws into the liability created by the partner-

ship business in California? And if this rule obtains as to contract of partners between themselves, why not also as to contracts of stockholders between themselves in forming a corporation?

"In this case it appears that the business transactions out of which these liabilities arose were carried on in California. They resulted from business done in California by virtue of an express contract made by the stockholders with reference to such business. It is unnecessary to express an opinion upon the question whether any personal liability would be assumed by the stockholders in reference to business transacted in Colorado. Parties may contract with special reference to carrying on business in separate States, and when they make an express contract therefor the business transacted in each of the States will be affected by the laws of those States, and may result in a difference of liability. Neither is it necessary to express any opinion upon the question whether the defendants could have been held liable under the California Statutes, independently of the provisions of the Colorado charter. All that we here hold is that when a corporation is formed in one State, and by the express terms of its charter it is created for doing business in another State, and business is done in that State, it must be assumed that the charter contract was made with reference to its laws; and the liabilities which those laws impose will attend the transaction of such business."

When the charter of the plaintiff in error provided for doing business in other States, this involved a charter contract that the business done in these States should be governed by their laws. If then the laws of any State where business was being done imposed a liability different from that under the laws of New York, this difference would be within the provision of the charter, and the non-resident stockholders must be held to have consented thereto.

The contract with Ebaugh having been made in South Carolina, the association and all its membership will be deemed to have consented through the charter, that it should be governed by the laws of that State.

II.

THE DECISION OF THE STATE COURT WAS NOT OPPOSED TO THE LAWS OF NEW YORK.

It was incumbent upon plaintiff in error to prove that the liability of the corporation under the laws of New York was different from that under the laws of South Carolina. The evidence on this point consists of two Statutes and four decisions, to which the discussion will now relate.

(A)

AS TO THE STATUTES.

These were the Acts of April 10, 1851, and an amendatory Act of June 9, 1875 (Record, p. 31-7).

The following points will be developed in this discussion:

The Statutes contain no express provision against the issue of stock guaranteeing a definite period of maturity; nor is such a prohibition to be implied; but if implied it arises from construction and from consideration touching the general nature of such associations, and in neither case is a federal question raised.

The provisions of the Act of 1851, in so far as they affect the question at issue before this Court, are briefly stated below:

Section 1 provides that nine or more persons may form a corporation for the purpose of accumulating a fund to buy real estate, erect buildings and erect improvements, or to aid its members in acquiring real estate, &c. (The business is therefore not limited strictly to the business of a building and loan association, but may have a wider scope.)

Section 2 declares that articles of association shall be signed by such persons, providing among other things "the manner of withdrawal of shares" and the "ultimate amount to be paid to the owners of unredeemed shares." (This section evidently contemplated that the amounts which should ultimately be paid to the owners of shares which had not been redeemed by the association ,was a matter to be determined by the association itself.)

Section 3 provides that a copy of the articles so signed shall be filed by the Clerk of the Court, and that the association may commence business and be vested with the powers conferred by title3, chapter 18 of the first part of the Revised Statutes. (This chapter was not introduced in evidence,

hence so far as the evidence shows, the powers of this association are unlimited. It was incumbent upon the association to show that the contract in question was beyond the scope of the powers as conferred, but it has not done so.)

Section 4 authorizes the trustees to call for all sums of money subscribed, under penalty, etc.

Section 5 gives the power to borrow money for not over two years.

Section 6 does not touch the question at issue.

Section 7 was amended by the Act of 1875 and need not be set forth here.

Sections 8 to 22 do not touch the question at issue.

The Act of 1875 amends section 7 of the Act of 1851 and provides that the trustees may "from time to time declare dividends from the earnings of the association * * * but no dividends shall be declared except from the earnings of the association." It further declares that "no holder of redeemed shares shall claim to be exempt from making the monthly or other stated payments provided in the articles of association, upon the ground that by reason of losses, or otherwise, the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest." It also provides that the Statute of Usury shall not apply to its loans.

The other sections of the Act of 1875 relate to the reports to be made by the officers and the superintendence to be exercised by the government.

No provision declares that all stockholders shall be bound to pay equal amounts, or upon the same basis. No express provision prevents the issue of stock for cash, or payable in installments and to be deemed paid up at a definite period. The association is to determine for itself "the ultimate amount to be paid to the owners of unredeemed shares."

Act of 1851, sec. 2.

Thus it is left to the association to make its own regulations as to the issue of stock, and its own agreements as to the time and amount of ultimate payment.

The provision that dividends shall be paid only out of the earnings is not conclusive, for: (1) It does not appear that the earnings are sufficient to pay Ebaugh and those occupying the same position. (2) The money payable to Ebaugh is not a dividend, but the ultimate amount agreed to

be paid him as the owner of unredeemed shares. (3) This provision contains no express denial of such power, and the rights of creditors not intervening, there is no reason why it should be implied.

There being no express prohibition against the issue of stock maturing at a definite period, such a prohibition, if it exists at all, is implied, and can only arise from considering the general nature of building and loan associations. But deductions from this source are matters in the realm of general law; and if a State Court reaches incorrect conclusions thereon, no federal question is presented.

O'Malley vs. Association, 92 Hun. 572, on which the attorneys for the other side lay so much stress, does not decide that certificates containing agreements as to definite periods of maturity are expressly forbidden by the Statute; but that "the authority to issue a certificate with a fixed period of maturity is not expressly given." (Record, p. 41.) It is true that the Court did conclude that the association had no authority to issue such certificates; but it based that conclusion upon the mutual character of such associations and on the consideration that a contrary construction might lead to bankruptcy. That case was decided three years after the contract with Ebaugh; and yet the question as to the authority of the association to issue certificates of this character is treated as having been determined by no previous authoritative decision, and hence as being still open in that State. That decision, as we have said, rests almost entirely upon considerations arising from the general nature of such associations.

(B)

AS TO THE DECISIONS INTRODUCED BY PLAINTIFF IN ERROR.

These decisions are as follows:

Association vs. Reed, 93 N. Y., 474.
People vs. Lowe, 117 N. Y., 175.
O'Malley vs. Association, 92 Hun., 572.
Englehart vs. Association, 148 N. Y.

The last two decisions are subsequent to the contract with Ebaugh.

Concordia, etc. vs. Reed, supra, was an action to foreclose

a mortgage given by a member of the association. The mortgage provided [illegible] when the payments upon the shares and fines amount to a sufficient sum to mature the shares. The Court held that the burden of showing sufficient payments from these sources was upon the mortgagor, and further that the premium paid for the loan did not constitute usury. It did not touch the point at issue in the case at bar.

People vs. Lowe, supra, was a contest between the members of an association that had gone into liquidation before the maturity of its shares. The Court held that all members were entitled to share pro rata and equally, and that those who had borowed from the association must pay into the treasury enough to equalize matters, and that the remission of fines was in the discretion of the managers. This case did not touch the point at issue here.

In neither of the foregoing cases was the power to issue certificates with definite maturity provisions in issue, and neither decision contains any announcement bearing on the question. We leave it to the counsel on the other side to get what comfort they can from these two cases.

The other two cases were decided after the contract was made with Ebaugh, and hence they can have only an argumentative effect in determining what was the law of New York at the time of the contract.

The rule is well settled that the Courts of one jurisdiction in construing the Statutes of another jurisdiction must, in the absence of authoritative decisions of the latter jurisdiction fixing the construction, exercise their own independent judgment as to the proper construction; and that they should not be governed by decisions rendered subsequent to the date of the contract.

Pinegrove Township vs. Talcott, 86 U. S., 227.
Burgess vs. Seligman, 107 U. S., 364.
Carroll County vs. Smith, 111 U. S., 556.

The decision in O'Malley's case was not rendered by a Court of last resort; it is not an authoritative decision in New York; and hence the South Carolina Courts should not have regarded it as settling the law. Besides, this decision did not rest upon the express terms of the Statute, but rather upon the general nature of the corporation.

Englehart vs. Association, supra, was a decision of the

Court of Appeals rendered in 1896. There were only two questions considered, viz: (1) whether a withdrawing stockholder could recover judgment for the amount paid in by him without showing necessary funds in the treasury. This claim was made under the provisions of the articles of association to the effect that the dues paid in by withdrawing stockholders "will be refunded to them when the necessary funds are collected." The Court held that the right to recover was qualified by this provision and that it was necessary to show that sufficient funds had been collected. (2) The other question was whether a by-law adopted after a withdrawing stockholder had become a member, prescribing the order of paying withdrawals, was binding. The Court held that the association had the right to make reasonable by-laws and that this one was binding upon all members. These were the only questions considered by the Court, and the discussion fails to dislose any allusion to the question under consideration.

These are the decisions upon which the plaintiff in error relied. Two were prior to the contract, but these did not touch the point in issue here. The other two decisions were subsequent to the contract; one of these, however, did not touch the question in this case, and the other was rendered by an inferior Court.

AS TO THE DECISIONS INTRODUCED BY DEFENDANT IN ERROR.

These are:

Whitney Arms Co. vs. Barlow, 63 N. Y., 62.
DeGrauff vs. Thread Co., 21 N. Y., 124.
Match Co. vs. Roeber, 106 N. Y., 473.

The purpose of these was to show that, even if the stipulation as to a fixed period of maturity were in excess of its corporate authority, the association having led Ebaugh into the contract by its false promises and having received and retained his money, could not refuse to perform its agreement.

In Whitney Arms Co. vs. Barlow, supra, at p. 70, the Court said: "It is now very well settled that a corporation cannot avail itself of the defense of ultra vires, when the contract has been in good faith fully performed by the other

party and the corporation has had the full benefit of the performance of the contract."

In DeGrauff vs. Thread Co., supra, at p. 128, the Court put the case as follows: "To deny relief to a plaintiff thus situated, would substantially secure to the party deliberately violating one of the laws of its existence, and when no guilty complicity can be charged upon the other party, the fruits of an illegal transaction and operate as a premium upon repudiation and fraud."

The State Court held upon this showing that under the laws of New York, the association could not refuse to perform the agreement into which it had enticed Ebaugh (by more than questionable means) and the price of which it had received from him.

Counsel claim that this is not the doctrine of New York, but they introduce no proof to conrovert it.

They claim that the foregoing cases ought not to be applied to mutual associations. But they introduced in evidence no decisions showing that such associations were excepted from the rule; and in the absence of a showing to this effect, the South Carolina Courts were bound to reject the suggestion, for in that State it has been held that mutual companies are bound by their contracts to the same extent as ordinary corporations. McBride vs. Mutual Ins. Co., 55 S. C., 589; Sparkman vs. Supreme Council, 57 S. C., 16.

This doctrine was applied by the Supreme Court of South Carolina to the case of a mutual corporation, in Williamson vs. Association, 54 S. C., 582, where it was said: "when a private corporation has entered into a contract not immoral in itself, and not forbidden by any Statute, and it has been in good faith performed by the other party, the corporation would not be heard on a plea of ultra vires."

Where the doctrine that one should not be allowed to repudiate liability on a contract after he has received the benefits, is applied to corporations at all, it should be applied equally to mutual and ordinary corporations. Both classes are formed for the personal benefit of the stockholders, who are mutually interested in the capital and earnings. Both must act through agents, and should be equally bound by contracts so made.

In National Bank vs. Matthews, 98 U. S., 621, this Court, quoting from Sed. Sts., said: "where it is a simplequestion * * * of power conferred by the charter, a party who has

had the benefit of the agreement cannot be permitted, in an action founded upon it, to question its validity."

No federal principle was violated by the holding that the plaintiff in error was estopped to make the plea of ultra vires. Gilles vs. Stinchfield, 159 U. S., 653.

III.

The State decision did not violate Const., art iv, sec. 1.

This clause reads as follows: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws provide the manner in which such acts, records and proceedings shall be proved, and the effect thereof."

As suggested from the bench on the argument of the case of Association vs. Welling, it may well be doubted whether this clause was intended to provide that the public Statutes of the several States should be given effect by the Courts of the other States. If "public acts" means those general rules of law adopted by Statute, the question at once arises why no provision was made for the equally important rules of law recognized as part of the common law of the several States or established by the decisions of their Courts. Did the clause mean that the statutory rules of law applicable to contracts made in a State shall be enforced by the Courts of every other State where the contract might be brought in question, but that those other rules, constituting the great body of the laws of each State, may be ignored with impunity? It is certain that the clause makes no guarantee of "full faith and credit" as to the common law, or as to those principles settled by the decisions of the several States. And this silence is eloquent as to the meaning. If the purpose was to guarantee faith and credit to the public laws of each State, the expression "public acts" would not have been employed. The Convention would hardly have intended to secure faith and credit to what is really a small portion of the public laws, and make no provision for the larger and more important portion of these public laws.

The Articles of Confederation had provided that "full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and

magistrates of every other State." The words "acts,' as used here, was certainly not the equivalent of public Statutes; rather did it refer to these transactions on the part of the State of an administrative character. When this clause, with slight changes in verbiage and in the position of the words, was transferred to the Constitution, there is no reason for supposing that the word "acts" was used in an essentially different sense.

A public Statute will be a "public act" within the meaning of this clause, if it grants a franchise, or creates a contract on the part of the State. Of such character was the Statute under discussion in the Wiggins Ferry Case, 119 U. S., 615.

Anotehr question, which, aswe are informed, was suggested from the bench, is whether the "full faith and credit" which were guaranteed by the Constitution means the "same effect and force" allowed in their own States. To this we think a negative answer must be made.

The Constitution guaranteed "full faith and credit," but committed to Congress the power to prescribe "the effect." The matter guaranteed and the matter referred to Congress can not be one and the same thing. There must be a difference. "Full faith and credit" is denied only when the authority of the State, or the validity of the public act, record or proceeding, is drawn in question.

Rd. vs. Hopkins, 130 U. S., 210.

By guaranteeing "full faith and credit," the Constitution did not mean to declare "the effect"—that much is certain. So that the extra-territorial effect of "public acts" is not settled by the Constitution.

In pursuance of the power conferred upon Congress, that body declared that the acts of the legislatures of any State shall be authenticated under the great seal of the State, and the records and judicial proceedings by the attestation of the Clerk of the Court, &c., "and the said records and judicial proceedings so authenticated shall have such faith and credit in every Court of the United States as they have by law, or usage of the Courts, of the State from which they are taken." Rev. Sts., sec. 905.

Although Congress provided the mode of proving the Acts of the Legislature, it made no provision as to "the effect" of these Acts when proved. The extra-territorial effect of public Statutes not having been prescribed either by the Constitution, or by Act of Congress, the question was

left open for the detremination of the several State Courts. These Courts, although not bound by any federal law, would of course continue to observe the rule of comity. And this brings us to discuss that rule, and to show that a violation thereof raises no federal question.

It is quite true, as stated by counsel for plaintiff in error (p. 20-2), that prior to the Constitution it was a rule of public law that personal contracts should be allowed by the Courts of any country, where they might be called in question, the same effect, which they have in the country where made. This, however, was a rule of comity, to which there was a qualification fatal to its application in the present case, viz: that the contract when so construed should not be against public morals, or opposed to the public policy of the forum.

Counsel argue that Art. IV, sec. 1 was intended to crystalize this rule and enforce its recognition by the States. The rule of comity embraced the entire body of law. A constitutional provision seeking to adopt this rule would hardly limit its operation to these laws which were of statutory origin.

Counsel's position is that wherever a transaction had in one State comes in question before the Courts of another State, the full faith and credit clause guarantees that the laws of the State of the transaction shall be applied by the Courts of the forum; and that no cengressional action is necessary to secure this result.

But if this be so, why was it thought necessary to make special provision by Act of Congress that the Courts of the several States should give to records and judgments of other States the same effect which they have under their own laws? Do domestic laws, under the full faith and credit clause, follow contracts and other private transactions into other States, but stop at the State limits as to records and judgments? And yet records and judicial proceedings are specially named as coming within the full faith and credit clause, while contracts and other private transactions are not named, and were not intended to come within that clause.

This clause of the Constitution was intended to secure inter-State recognition of the validity of the public acts, records and judicial proceedings of the several States; but was not intended to secure their proper construction and

interpretation—certainly there was no purpose to afford a constitutional guaranty for the correct interpretation of private contracts.

The law of the place of contract is said to form a part of the contract, but only because the Courts of other States and countries will ordinarily give to the contract such force as it posses under the laws of the place wehere made. In no other sense is the law of the place of the contract a part of the contract—certainly this is not a result of any constitutional guaranty, because the doctrine existed before the birth of the Constitution. The failure, then to construe a contract according to the laws of the State where made, is in no sense a violation of the constitutional provision. This must be admitted as a general proposition. An exception as to statutory rules would only lead to absurdity. The conclusion is unassailable, that this clause was not intended to secure for contracts the same interpretation, to which they are entitled under the laws of the place where made.

When Courts err in the construction of the Statutes of their own States, there is no denial of faith and credit. And it is certain that the constitutional guarantee of "full faith and credit" was not intended to enforce correct construction of every Statute of another State which might incidently arise in the course of trial.

An interpretation which is radically wrong will not raise a federal question.

Central Land Co. vs. Laidley, 159 U. S., 103.

The point, that erroneous construction of the Statute of another State is not a denial of full faith and credit to that Statute, is clearly developed by the recent decisions of this Court.

In Glenn vs. Garth, 146 U. S., 360, the Chief Justice employed the folowing language:

"If, every time the Courts of a State put a construction upon the Statutes of another State, this Court may be required to determine whether that construction was, or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the State Courts had refused to give full faith and credit to the Statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated. The distinction between the construction of a Statute and

the validity of a Statute has frequently been adverted to by this Court."

This doctrine was reaffirmed in Lloyd vs. Matthews, 155 U. S., 222.

Banholzer vs. Insurance Company, 178 U. S., 402, was another case directly in point. It was held there that even, if the construction placed upon a New York Statute by the Courts of Minnesota was erroneous, faith and credit was not thereby denied to that Statute. Accordingly the Court dismissed the writ.

In Glenn vs. Garth, supra, the Court referred to the case of Baltimore P. R. Company vs. Hopkins, 130 U. S., 210, as drawing the distinction between misconstruction and the denial of the validity of a Statute. On reference to that case we find the following language:

"Whenever the power to enact a Statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise."

The terms of the referee's report, which was made the basis of the Circuit and of the Supreme Court decisions, show conclusively that the validity of the New York Statutes was not denied, but on the contrary, that the terms of those Statutes were carefully considered and a construction placed upon them (deemed by the State Courts correct, but which is disputed by the plaintff in error); it shows also that due consideration was given to the decisions of the Courts of New Yeork rendered at the date of the contract. The conclusion reached was that the contract was not forbidden by the Statutes of New York, and that even if it were in excess of the charter powers (and the Court did not believe this to be the case) yet, "under the principles of law as established in that State, and in this State, the defendant would be bound to perform its promise where it had received, and where it retains, the benefits of the transaction."

IV.

THE DECISION OF THE STATE COURT DID NOT OPERATE TO IMPAIR A CONTRACT, OR TO DEPRIVE PLAINTIFF IN ERROR OF ITS PROPERTY WITHOUT DUE PROCESS OF LAW.

The State decision enforced the contract according to its express terms. It declined to permit a positive promise to be emasculated by a doubtful application of the by-laws. It construed the laws of New York so as not to destroy the binding force of the agreement. How such a decision can be regarded as an impairment of the contract is past comprehension.

The Constitution prohibits the passage by the States of laws impairing the obligation of contracts. The decision of the State Court certainly did not amount to the passage of a law.

The case of Central Land Company vs. Laidley, 159 U. S., 103, is conclusive upon this question. The Court employed the folowing language: "The appellate jurisdiction of this Court, upon writ of error to a State Court, on the ground that the obligation of a contract has been impaired, can be invoked only when an Act of the Legislature alleged to be repugnant to the Constitution of the United States, has been decided by the State Court to be valid, and not construed by the Court * * * * It was said by Mr. Justice Miller, in delivering a later judgment of this Court: "We are not authorized by the Judiciary Act to reveiew the judgments of the State Courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a State could be brought here, where the party setting up a contract alleged that the Court had taken a different view of its obligation to that which he held.' Knox vs. Exchange Bank, 79 U. S., 379."

Again in the same case the same doctrine was stated by Mr. Justice Harlan speaking for this Court, as follows: "The State Court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void, which in our opinion, is valid; it may adjudge a contract to be valid which, in our opinion, is void; or its interpretation of the contract may,

in our opinion, be radically wrong; but in neither of such cases, would the judgment be reviewable by this Court under the clause of the Constitution protecting the obligation of contracts against impairment by State legislation."

Again, it is said in the same case: "When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a State Court does not deprive the unsuccessful party of his property without 'due process of lay,' within the 14th Amendment of the Constitution of the United States."

See also Bower vs. Texas, 163 U. S., 216.

V.

THERE WAS NO VIOLATION OF THE INTERSTATE COMMERCE ACT.

The argument of counsel under this head is ingenious and interesting, but there are two reasons why it has no practical application to the case at bar:

(1) The point is not made by any assignment of error.

(2) In order that a question should arise under this Act, it must appear that some right, conferred or protected by the Act, has been violated, and in this case there is no such showing.

VI.

IN CONCLUSION.

Counsel for plaintiff in error make a fierce attack upon the State dicision, charging that it is "a mere pretext, upon which to deprive plaintiff in error of its property, and to refuse to give full faith and credit to the laws of New York;" (Brief, on motion to dismiss, p. 28) that it "may be due process of law, but, if so, it is neither justice nor honesty" (p.35); that it is "repudiation and confiscation and not construction and interpretation."

This language invites the Court to declare that the South Carolina Court dealt dishonestly with the question at issue, and indeed this is the only ground upon which counsel can hope for a reversal.

It is possible that a State Court, while professing to give full faith and credit to the Statutes of another State, may in

fact repudiate the validity of those Statutes. But that would be an extreme case, and very different from the one at bar. This Court, being familiar with the high character of the South Carolina judiciary, will require of us no answer to such a charge—certainly not when made in behalf of one who, having obtained money under a promise solemnly and deliberately made, now seeks to escape liability by the pitiable plea of ultra vires.

The mental attitude of the association is correctly described in an old couplet:

> "Ne'er thief did feel the halter draw
> With good opinion of the law."

If counsel's language has any real meaning, the purpose was to declare that the doctrine contended for by plaintiff in error is so plain under the laws of New York that there is no room for two honest opinions.

But this statement presents a terrible arraignment against the association, which must be presumed to have known its charter powers and the laws under which it was created. If the promise to mature in 78 months was plainly void and known to be so, then the association was guilty of gross fraud in issuing such a promise and receiving money paid upon the faith of its validity.

Counsel can extricate their client from this unfortunate predicament only by admitting the correctness of our contention, that there was no express prohibition against such contracts, and that his conclusion can be reached only by a (doubtful) construction of the terms of the Statute. And this admission would be fatal to the writ of error.

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ADDENDA TO ARGUMENT FOR DEFENDANT IN ERROR.

Article IV, section 1, of the Constitution provides (1) that full faith and credit should be given to the public acts, records, and judicial proceedings of each State by every other State; (2) and that Congress should have power to prescribe the manner of proof, and the effect when proved.

We have already indicated certain reasons why "public acts," as here employed, is not the equivalent of public statutes, but rather refers to public acts of an executive character.

Brief, p. 15.

No definite meaning has ever been given to the words "full faith and credit." The same expression is found in the Articles of Confederation; and, in the language of Alexander Hamilton, it was thought to be "extremely indeterminate, and (that it) can be of little importance under any interpretation which it will bear."

The Federalist, p. 296.

In Railroad *vs.* Hopkins it was declared that full faith and credit is denied a public act only when the authority of the State or the validity of the act is drawn in question.

130 U. S., 210.

It is certain that the Constitution, by guaranteeing full faith and credit, did not intend to provide for the extra-territorial effect of public acts, for by the same section the latter subject was expressly committed to Congress. The purpose was to confer upon Congress "the power of prescribing by general laws the manner in which the public

acts, etc., shall be proved, and the effect they shall have in other States."

The Federalist, p. 296.

Congress has refrained—and evidently with a purpose—from providing any fixed rule touching the extraterritorial effect to be given State statutes. Had the Constitution or Congress declared that every State must give the same effect to the statutes of each State which they have in the enacting State, the following consequences would have followed:

Vicious legislation adopted by a State would be entitled to full effect in every other State; statutes permitting fraudulent transactions, or polygamous or incestuous marriages, or legitimating lotteries or other forms of gambling, would call for respect and enforcement at the hands of all State courts. The Northern States would have been required to give full effect to the slavery laws of the South and to protect and enforce property rights in slaves—and in this case the clause of section 2, article IV of the Constitution, requiring the surrender by the States of persons held to labor under the laws of any State, would have been entirely useless; but this court, in enforcing slavery rights in the Northern States, always grounded its decision upon section 2 of article IV. If the slavery laws of the South were guaranteed full effect in the States of the North by section 1 of article IV, how did this court happen to overlook the fact?

Judgments of a sister State are held conclusive of all issues because Congress declared that they should have this effect.

"The Constitution contemplated a power in Congress to give a conclusive effect to such judgments."

Miles *vs.* Duryee, 7 Cranch, 481.

The failure of Congress to exercise the power to declare the effect of public acts of other States leaves such acts without a guaranteed extraterritorial effect.

And so it happens that the State courts, in applying the laws of sister States to controversies in hand, have always been governed by the rules of comity as between States, and not by any constitutional requirement.

Chief Justice Taney, in Bank *vs.* Earle, said:

"They are sovereign States; and the history of the past, and the events which are daily occurring furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent" (13 Pet., 590).

Again:

"But we have already said that this comity is presumed from the silent acquiescence of the State. Whenever a State sufficiently indicates that contracts which derive their validity from its comity are repugnant to its policy, or are considered as injurious to its interests, the presumption in favor of its adoption can no longer be made" (13 Pet., 592).

Mr. Webster, in his great argument in that case, admitted that the rule was not established by any supreme authority, but rested solely upon "the common consent and understanding of the States."

If there is the constitutional guarantee contended for by plaintiff in error, counsel and the court were guilty of a strange oversight in Bank *vs.* Earle.

The courts without exception have declared that State statutes creating corporations depend for recognition by other States upon comity alone.

In Paul *vs.* Virginia, Justice Field said:

"The recognition of its (the corporation's) existence even by other States, and the enforcement of its contracts made therein, depends purely upon the comity of these States—a comity which is never extended where the existence of the corporation, or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition" (8 Wall., 181).

In the case at bar the State court has construed the corporate powers of the plaintiff in error and has determined its liability by the same rules and principles which would be applied to a domestic corporation of like character. Should more than this be required?

"The equal protection of the law, which these bodies may claim, is only such as is accorded to similar associations within the jurisdiction of the State."
Mining Co. *vs.* Pa., 122 U. S., 188.

There would be great inequality if the contention of the plaintiff in error should prevail; for the association would then be exempt from liability under circumstances where a domestic corporation would be bound.

It is the settled doctrine of South Carolina that contracts free from fraud and not forbidden by law, which are in excess of corporate powers, will be enforced against a corporation that has received the benefits thereof. To permit a corporation to escape liability under such circumstances would (according to this doctrine) be to assist in a fraud, and be opposed to the public policy of the State.

No constitutional provision requires that the courts of that State should decide such a controversy in opposition to its own settled principles and in violation of its ideas of right and wrong and of public policy.

By coming into South Carolina and doing business there, this foreign corporation submitted itself to the jurisdiction of that State and consented to be bound (so far as the business done there is concerned) by the laws of that State, even though such laws impose upon the corporation liabilities not existing under the laws of New York. The charter and the laws of New York, by authorizing business to be done in other States, consented in advance to such result.

It follows, therefore, that if the association has been held, under the contract with Ebaugh, to a greater liability than that imposed by the laws of New York, the result is within the purview of such laws and of the charter.

The State court, however, did not undertake to decide this case without reference to the New York statute, but, on the contrary, considered fully its operation and effect. Even if its interpretation were radically wrong, this would be no denial of full faith and credit.

Banholzer *vs.* Matthews, 178 U. S., 402, and other cases cited in brief.

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